No. 83-345

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM J. McCARTHY, ET AL.
PETITIONERS

v.

CHARLES D. BONANNO LINEN SERVICE, INC., ET AL.
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Charles D. Bonanno Linen Service, Inc., In Opposition to Petition for Writ of Certiorari

SIDNEY A. COVEN
COUNSEL OF RECORD
HOWARD I. WILGOREN
LEPIE, COVEN & WILGOREN
18 Tremont Street
Boston, Massachusetts 02108
(617) 523-8240

ADDISON C. GETCHELL & SON, INC. · THE LAWYERS' PRINTER · BOSTON

Counterstatement of Questions Presented

1. Whether the conclusion of the Court of Appeals For the First Circuit that the District Court did not abuse its discretion in refusing to remand the claim against Petitioner Teamsters Union Local No. 25 was proper given the existence of a substantial federal question arising under Section 303 of the Taft Hartley Act (29 U.S.C. § 187) on the face of the Complaint.

2. Whether the Court of Appeals For the First Circuit correctly concluded that 28 U.S.C. § 1441(b) allows removal of claims against Petitioner Teamsters Union, Local No. 25 "arising under" 29 U.S.C. § 187 and related pendent state law claims even if the state law claims against individual defendants must be remanded.

Table of Contents

Table of Authorities

CASES

STATUTES

OTHER AUTHORITY

No. 83-345

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM J. McCARTHY, ET AL.
PETITIONERS

v.

CHARLES D. BONANNO LINEN SERVICE, INC., ET AL.
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Charles D. Bonanno Linen Service, Inc., In Opposition to Petition for Writ of Certiorari

Counterstatement of the Case

Charles D. Bonanno Linen Service, Inc., (hereinafter "Bonanno") is engaged in the laundering, rental and distribution of linen and related products. In 1975 Bonanno, as part of a multiemployer bargaining unit of linen companies, was engaged in collective bargaining for a successor collective bargaining agreement with petitioner Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 25 (hereinafter "Teamsters Union"). After negotiations continued for a period of several months, an impasse was reached. When further negotiations failed to break the impasse, the Teamsters Union commenced a selective strike against Bonanno on June 23, 1975.[1]

[1] Most of the remaining employer members of the multiemployer unit locked out the Teamsters Union on the following day.

The strike was marked by violence from its inception (App. 44a-46a).[2] As a result on August 7, 1975, Bonanno and several other linen companies commenced an action in Superior Court of Suffolk County, Massachusetts, against the Teamsters Union and various of its officers and members (hereinafter "individual defendants"). The action sought injunctive relief and damages for the violent conduct and threats of violence perpetrated upon their property and employees as well as various third parties who ceased doing business with them, because of such conduct engaged in by the Teamsters Union, and the individual defendants.

Four days later the Teamsters Union and the individual defendants filed a petition for removal with the United States District Court for the District of Massachusetts. The petition alleged that allegations of the state court complaint appeared to state a cause of action arising under 29 U.S.C. § 187 of which the district court has original jurisdiction.

The allegations of the complaint referred to in the petition for removal allege in relevant part that:

> 20. Defendants have indulged in numerous illegal acts of violence and/or threats of violence towards both Plaintiff's property and employees, and towards third parties trying to do business with Plaintiffs at Plaintiff's respective place of business, including;
>
> . . .
>
> (f) The valve of an oil truck was cracked open while parked at the Roxbury place of business of Plaintiff, Standard, thereby causing approximately eight hundred gallons of heavy fuel oil to spill onto said plaintiff's premises . . .
>
> (h) Various third parties doing business with Plaintiffs have been threatened with physical violence by pickets identified as linen supply drivers involved in the labor dispute and members of Local 25 . . .

[2] "App." references are to the Appendix contained within Petitioner's Writ of Certiorari filed herein.

> 22. By reason of the number of persons from time to time engaged in the aforementioned picketing as well as the manner in which such picketing is being conducted, and by reason of the acts of violence and threats of violence directed . . . against third parties doing business with Plaintiffs, Defendants have willfully and intentionally attempted . . . (b) to interfere with the shipment and/or receipt of goods by Plaintiffs. As a result of the foregoing, certain employees of the Plaintiffs have in fact absented themselves from work, and certain suppliers of the Plaintiffs have refused to deliver supplies.

Subsequently, Judge Tauro of the District Court issued a temporary restraining order. In so doing, the Judge found that "the Court may exercise jurisdiction over this case under 28 U.S.C. § 1441, 29 U.S.C. § 187 and under the principles of pendent jurisdiction pursuant to Section 20(c) of Chapter 149 and Section 6 of Chapter 214 of the Massachusetts General Laws." On March 15, 1976 the court below affirmed the restraining order as a temporary injunction. *Charles D. Bonanno Linen Service, Inc. v. McCarthy*, 532 F.2d 189 (1st Cir. 1976).

On April 7, 1980, almost five years after filing for removal, and one day before a pre-trial conference before District Court Judge Keeton,[3] the Teamsters Union and the individual defendants filed a motion to terminate the injunction and remand for want of jurisdiction. On September 30, 1980, Judge Keeton denied the motion finding that inasmuch as the complaint raised a "substantial" federal claim, a discretionary exercise of pendent jurisdiction over related stated law claims was appropriate (App. 31a, 33a-37a). After trial, Judge Keeton reaffirmed the correctness of his previous de-

[3] Judge Keeton was assigned the case for trial after another district court judge recused himself at the commencement of the trial scheduled to be held on December 10, 1979.

termination that the federal claim was "substantial when the action was removed to federal court" (App. 59a-60a). Judge Keeton awarded Bonanno damages based upon the unlawful and violent conduct of the Teamsters Union and the individual defendants.

On May 9, 1983 the court below issued its decision (App. 1a, as modified on Denial of Rehearing and Rehearing En Banc June 1, 1983). The court concluded that the allegations of the complaint set forth a "substantial" claim under 29 U.S.C. § 187 and accordingly the district court did not abuse its discretion in exercising pendent jurisdiction over Bonanno's state law claims against the Teamsters Union (App. 9a-14a). The Court below further concluded that 28 U.S.C. § 1441(b) supported retention by the federal court of the claim against the Teamsters Union even though it remanded the claims against the individual defendants to the state court (App. 24a-25a).[4]

Reasons for Denying the Writ

The court below, in accordance with well established decisions of this Court, properly found that Bonanno's state law complaint raised a "substantial" claim under 29 U.S.C. §187. Accordingly, it affirmed the district court's exercise of pendent jurisdiction over state law claims against the Teamsters Union as not being an abuse of discretion.

Petitioner's claim that such an exercise of pendent jurisdiction was contrary to the decision of this Court is deficient in two respects. First, the Teamsters Union fails to establish that the federal claim as stated on the face of the complaint is "so patently without merit as to justify dismissal for want of jurisdiction," as required by *Hagans v. Lavine*, 415 U.S. 528, 543 (1943). Rather, as the court below aptly noted, the Teamsters Union's argument in this regard goes to the merits of

[4] On July 5, 1983, Satisfaction of Judgment was entered on the docket of the district court certifying that the amount of the judgment had been satisfied.

the federal claim raised, not to the crucial question as to whether or not a federal claim was raised by the complaint. Second, given that the complaint raises a "substantial" federal claim, the Teamsters Union cannot establish that the exercise of pendent jurisdiction over related state law claims by the district court was an abuse of discretion. The circumstances of the instant case, including the fact that the Teamsters Union itself removed the action from state to federal court in the first instance, as well as the substantial expenditure of judicial time and energy on this case, clearly militate in favor of retention of pendent jurisdiction.

As to the Teamsters Union's second argument, 28 U.S.C. § 1441(b) and decisions of this Court unquestionably support retention of jurisdiction even though state law claims against individuals must be dismissed. To hold otherwise would be inconsistent with this Court's well established rule that the removal statute encompasses the same "class of cases" as does the federal court's original jurisdiction statute. To rule otherwise would allow an employer to defeat a union's right to remove actions arising under 29 U.S.C. § 187 by combining such actions with state law claims against individuals in complaints commenced in state court. Such an anomalous result is plainly contrary to Congressional intent as expressed in 29 U.S.C. § 187 that such claims may be heard by a federal district court.

In sum, the court below decided the instant case entirely in accord with decisions of this Court and in conformity with applicable statutes. Nor does the Teamsters Union point to any decisions of other federal courts of appeals which are in conflict with the instant case. Accordingly, granting of the instant writ is not warranted.

I. Given the Existence of a Substantial Federal Claim Arising Under 29 U.S.C. § 187 the Affirmance by the Court Below of the Trial Court's Discretionary Exercise of Pendent Jurisdiction Over State Law Claims Against the Teamsters Union Was Not an Abuse of Discretion.

The decision of the court below affirms the judgment of the district court which was based solely upon state law claims[5] pursuant to that court's discretionary exercise of pendent jurisdiction. Thus, the crucial question for determination is whether the exercise of pendent jurisdiction was appropriate.

It is submitted that the decision of the court below fully comports with this Court's pronouncements as to the discretionary exercise of pendent jurisdiction by a district court. In *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), this Court set forth the standard to be applied in determining the propriety of exercising pendent jurisdiction. The Court stated the test as follows:

> The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues v. Morrin*, 289 U.S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if considered without regard to their federal and state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding then, assuming substantiality of the federal issues, there is *power* in the federal courts to hear the whole.

(emphasis in original).

---

[5] The fact that only state law claims were ultimately tried does not require dismissal for want of jurisdiction, especially as here where there has been substantial expenditure of judicial power and resources. The decision by Bonanno to try only state law claims did not deprive the district court of its constitutional power to hear and decide the state law claims. *Rosado v. Wyman*, 397 U.S. 397, 402-405 (1970).

There is no dispute that the federal and state claims against the Teamsters Union derive from a common nucleus of operative fact, or that they ordinarily would be tried in one judicial proceeding. The sole argument raised is whether the complaint raised a substantial federal question so that the exercise of pendent jurisdiction by the district court, as affirmed by the court below, was justified.

The standard set forth by this Court makes clear that establishment of a "substantial" federal question for purposes of a discretionary exercise of pendent jurisdiction is quite broad. The court below aptly summarized this Court's position as follows:

> that "substantial" in this context means no more than not "so insubstantial, implausible, foreclosed by prior decisions . . . or otherwise completely devoid of merit as not to involve a federal controversy . . ." *Hagans v. Lavine*, 415 U.S. 588, 543, 94 S.Ct. 1372, 1382, 39 L.Ed.2d 577 (1974); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666, 94 S.Ct. 772, 776, 3d L.Ed.2d 73 (1974); *accord, Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105-06, 53 S.Ct. 549, 550, 77 L.Ed. 1062 (1933)

(App. 9a).

Moreover, the determination of "substantiality" of the federal claim is to be made based upon examination of the face of the Complaint, not on the facts as they may eventually be established. *United Mine Workers v. Gibbs*, 383 U.S. at 727. A district court's conclusion that a "substantial" federal claim exists is entitled to considerable deference and should not be overturned unless it can be said with positive assurance that "the cause of action is so patently without merit as to justify dismissal for want of jurisdiction." *Hagans v. Lavine*, 415 U.S. at 543; *Gagliardi v. Flint*, 564 F.2d 112 (3rd Cir. 1977).

In accordance with the foregoing standard the district court, as affirmed by the court below, concluded that Bonanno's state court complaint raised a "substantial" federal question arising under 29 U.S.C. § 187 (App. 9a-13a, 33a-36a, 59a-60a).[6] That statute grants to the federal district courts the power to hear suits brought on behalf of whomever shall be injured in his business or property by reason of a labor organization's involvement in any activity or conduct defined as an unfair labor practice in Section 8(b)(4) of the National Labor Relations Act, as amended 29 U.S.C. § 158(b)(4)(ii). Section 8(b)(4) proscribes union activities that are designed to:

> (ii) threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is ... (B) forcing or requiring any person to cease ... dealing in the products of any producer, processor, or manufacturer, *or to cease doing business* with any other person ...

(emphasis added).

As found by the court below, the complaint amply alleged so called unlawful secondary activity within the meaning of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B) (App. 10a-12a; *see also* 33a-35a). The court below pointed to allegations contained in the complaint (see footnote 3 *supra*) in concluding that a "substantial" federal claim was pleaded.

Thus, the complaint alleges that the Teamsters Union "threatened, coerced and restrained" various third parties with physical violence in order to induce them "to cease doing

---

[6] The district court concluded after trial that "[e]ven if I were to evaluate the substantiality of the claim as of a later time — either at commencement of the trial or at the close of evidence — *I would still conclude, on the evidence presented in this case, that plaintiff's federal claim was neither frivolous nor obviously without merit.*" (App. 60a, n.11) (emphasis supplied).

business" with Bonanno and the other plaintiffs. Specifically, the complaint alleges that:

> (f) The valve of an oil truck was cracked open while parked at the Roxbury place of business of Plaintiff, Standard, thereby causing approximately eight hundred gallons of heavy fuel oil to spill onto said Plaintiff's premises
>
> * * * * * *
>
> (h) Various third parties doing business with Plaintiffs have been threatened with physical violence by pickets identified as members of Local 25.
>
> * * * * * *
>
> 22. [B]y reason of the acts of violence and threats of violence directed against third parties doing business with Plaintiffs, Defendants have willfully and intentionally attempted . . . (b) to interfere with the shipment and/or receipt of goods by the Plaintiffs. As a result of the foregoing . . . certain of the suppliers of the Plaintiffs have refused to deliver supplies.[7]

It is submitted that the conclusion of the court below, that the above described allegations contained in the complaint establish a "substantial" claim arising under 29 U.S.C. § 187 and 29 U.S.C. § 158(b)(4) for purposes of exercising pendent jurisdiction over related state law claims, is entirely in accord with pronouncements of this Court. Thus, as the court below succinctly stated,

> The mere existence of picketing, however, does not automatically render all union activity lawful. *See United Steelworkers v. NLRB*, 376 U.S. 492, 84 S.Ct. 899, 11 L.Ed.2d 863 (1964); *International Union of Elec. Workers v. NLRB*, *supra*; *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 71 S.Ct. 961, 95 L.Ed. 1277 (1951).

[7] Contrary to the assertion by the Teamsters Union (Pet. for Cert. at 10), it is not clear at all that the acts of violence, threats of violence and interference directed at neutral third parties as alleged in paragraph 22 of the complaint occurred at "Plaintiffs' respective places of business" or was confined solely to incidents occurring at the primary situs of the Union's picket lines.

> Where *an object* of the union's activity is to coerce third persons, it can fall within the prohibitions of § 8(b)(4), depending on the precise nature of the picketing and the intent of the pickets. *See, e.g., NLRB v. Enterprise Ass'n of Pipefitters, Local 638*, 429 U.S. 507, 510 (1977); *NLRB v. Denver Building Council*, 341 U.S. 675, 689 (1951); *United Scenic Artists, Local 829 v. NLRB*, 655 F.2d 1267, 1269-70 (D.C. Cir. 1981); *Texas Distributors, Inc. v. Local Union No. 100*, 598 F.2d 393, 400 (5th Cir. 1979); *Iodice v. Calabrese*, 512 F.2d 383, 388 (2d Cir. 1975). Here, Bonanno has alleged that the Union *intended to coerce* third persons into ceasing to do business with it, and it has alleged damage to the property of third persons. The determination of whether certain activity is primary or secondary can often be made only after exploration of the facts. *See International Union of Elec. Workers v. NLRB*, 366 U.S. at 673-74, 81 S.Ct. at 1289-90. Interpreting the pleadings liberally, *see* Fed. R. Civ. P. 8(f), we believe they allege conduct which could fall within the prohibitions of § 8(b)(4). *See, e.g., NLRB v. Servette*, 377 U.S. 46, 52-54 (1964). We note that appellants themselves believed as much when they asked for removal over seven years (and many judicial proceedings) ago. All this is only to say that Bonanno stated a claim, not that it could prove a violation of the Act (indeed, it failed to do so). But, since Bonanno alleged facts sufficient to present a federal question, the district court had the *power* to hear the case.

(App. 11a-12a) (emphasis in original).

Moreover, even assuming *arguendo* that the violent activity aimed at third parties was merely incidental to lawful primary picketing (*see* paragraphs 20(f) and (h) of the complaint at p.2 *supra*), the complaint nonetheless alleges conduct that is patently prohibited by section 8(b)(4) and 29 U.S.C. § 187. Complaint paragraph 22 alleges acts of violence by the Teamsters Union and its intentional attempts to force neutral employers to cease doing business with Bonanno and other

linen employers. Nowhere in that allegation are such acts in any way related to the conduct of the Teamsters Union's picket lines at the respective employer's places of business. Under these circumstances the court below was correct in concluding that the allegation against the Teamsters Union supported a claim that the Teamsters Union tried to "threaten, coerce or restrain" third parties in order to induce them "to cease doing business with" Bonanno and other linen employers in violation of § 8(b)(4)(ii)(B) of the National Labor Relations Act. Accordingly, the court below appropriately concluded that the district court had the constitutional power to hear and decide the pendent state law claims against the Teamsters Union.

Finally, given the constitutional power to resolve the pendent state law claims, "considerations of judicial economy, convenience and fairness to litigants", *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 627 (1974) militate in favor of affirming the discretionary exercise of pendent jurisdiction. In this regard, it should be noted that the case was removed from state court by the Teamsters Union. *See Kayser Roth Corp. v. Textile Workers Union of America*, 479 F.2d 524, 526 (6th Cir.), *cert. denied*, 414 U.S. 976 (1973). The Teamsters Union subsequently appealed the issuance of a temporary restraining order to the court below without questioning the matter of jurisdiction. *See Bonanno Linen Service v. McCarthy*, 532 F.2d 189 (1st Cir. 1976). And it was the Teamsters Union who delayed for almost five years, until the day before the pre-trial conference, in bringing its motion to remand for want of jurisdiction. By this point in the processing of the case, three different judges of the district court and the judges of the court below had expended considerable judicial resources. Under these circumstances, it cannot be said that the exercise of pendent jurisdiction was an abuse of discretion. To hold otherwise would constitute a colossal squandering of limited judicial resources and would be a gross miscarriage of justice.

II. 28 U.S.C. § 1441(b) Supports the Decision by the Court Below Affirming the Refusal to Remand the Action Against Teamsters Union Local No. 25 Even Though the Actions Against the Individual Defendants Are Remanded to State Court.

The court below concluded, in conformity with 28 U.S.C. § 1441(b) and longstanding decisions of this Court, that the retention of jurisdiction over claims asserted against the Teamsters Union was proper even though the claims against the individual defendants were remanded to state court (App. 24a-25a). The decision of the court below fully comports with applicable decisions of this court and with Congressional intent as expressed in 28 U.S.C. § 1441(b). Petitioner can point to no federal court of appeals decision in conflict with the decision of the court below. In short there are no "special or important reasons" that support a discretionary grant of the writ of certiorari in the instant case.

The court below properly relies upon 28 U.S.C. § 1441(b) in support of its conclusion that jurisdiction exists as to the Teamsters Union even though the claims against the individuals must be remanded. Section 1441(b) provides, in relevant part that:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the constitution, treaties or laws of the United States shall be removed without regard to the citizenship or residence of the parties.

It is well settled that cases within the original jurisdiction of the federal courts may be removed pursuant to 28 U.S.C. § 1441. As has been succinctly expressed by one commentary:

> The general principles governing federal question subject matter jurisdiction apply to the removal of cases involving federal law. For example, the passage of § 1441(b) "arising under the Constitution, treaties, or laws of the United States," virtually is identical to the language "arises under the Constitution, laws or treaties

> of the United States," which is the definition of original federal question jurisdiction found in Section 1331 of Title 28. Thus, it is quite appropriate to construe the provision in the removal statute as embracing the same class of cases as is covered by the original jurisdiction statute. *State of Tennessee v. Union & Planters Bank*, 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed. 511 (1894).

Wright, Miller and Cooper, *Federal Practice and Procedure*, § 3722 at p. 556 (1976).

As is amply demonstrated above, the Teamsters Union removed the instant matter from state to the federal district court on the basis that the allegations of the complaint raised a claim arising under 29 U.S.C. § 187. That statute states on its face that:

> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States . . .

Thus, it is patently obvious that the district court would have had original jurisdiction over Bonanno's claim arising under 29 U.S.C. § 187 had the matter been instituted in federal court in the first instance. Accordingly, it was appropriate for the court below to affirm the exercise of jurisdiction over the claim "arising under" 29 U.S.C. § 187 when the case was removed by the Teamsters Union.

Nor did the court below err in affirming the judgment against the Teamsters Union despite its view that the claims against the individual defendants had to be remanded to state court. This Court, in *The Pacific Railroad Cases*, 115 U.S. 1, 22-23 (1885), made clear that, claims such as those alleged against the Teamsters are properly removable to the federal court, despite the fact that claims against the individual defendants must be remanded. *See also Galveston, Harrisburg & San Antonio Co. v. Hall*, 70 F.2d 608 (5th Cir. 1934). Retention of jurisdiction over the Teamsters Union fully comports with the express terms as well as Congressional intent underlying enactment of § 1441(b). 1A J. Moore, *Federal Practice*, par. 157 [4-1] (2d Ed. 1982).

Moreover, requiring remand of the arising under claims against the Teamsters Union would effectively defeat Congressional intent, as expressed in 29 U.S.C. § 187, that a union be allowed to be adjudicate such claims asserted against it in a federal forum. If remand is required in the instant case, it will be a signal that all anyone asserting a claim arising under 29 U.S.C. § 187 against a union need do is interpose claims against individuals and union access to a federal forum will be effectively shut off. Artful pleading may not be used to close off a defendant's right to remove a claim to a federal forum, since it would interfere with Congress' express desire to allow a union to adjudicate claims arising under 29 U.S.C. § 187 in federal district court. *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968).

Conclusion

For all the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

SIDNEY A. COVEN
Counsel of Record
HOWARD I. WILGOREN
LEPIE, COVEN & WILGOREN
18 Tremont Street
Boston, Massachusetts 02108
(617) 523-8240